

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 23.

HARRY SLOCHOWER,

Appellant,

THE BOARD OF HIGHER EDUCATION OF
THE CITY OF NEW YORK,

APPEAL FROM THE COURT OF APPEALS OF THE STATE
OF NEW YORK.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

In the first point of his main brief the Appellant Slochower discusses the conflict between Section 903 of the New York City Charter and the Fifth and Fourteenth Amendments of the Constitution. The argument in substance is that the statute, in denying public employment to one who asserts the Fifth Amendment right against self-incrimination violates the Fourteenth Amendment prohibition against the abridgment of immunities of United States citizens.

The Appellee does not deny the force of that argument. It seeks to preclude Appellant from raising the question on the ground that it was not presented in the state courts.

The question of whether Section 903 is an abridgment of the constitutional immunity against self-incrimination was properly raised below and is properly before the court.

The questions presented in the first point of Appellant's brief are properly before this Court and its jurisdiction to pass on the issues must be sustained, for the question was argued below and was considered by the court below.

The Appellee's brief states (at p. 9), "The Appellant did not argue the question of possible conflict between Charter Section 903 and the Fifth Amendment in the New York courts. Accordingly it should not be considered by this court." The brief states further (at pp. 8-9), "At no time in any of the state courts was any reference to the Fifth Amendment made by petitioner." The Appellee's statements are at variance with the opinion of Judge Desmond in the court below. As Judge Desmond noted, the question was argued by Appellant and also by the Appellee. "All sides concede," he wrote, "that, aside from the supposed applicability of Section 903, the teachers could not be deprived of their positions for exercising their Fifth Amendment right (see *Matter of Grace*, 282 N. Y. 428, 434)" (R. 61) *Daniman v. Board of Education*, 306 N. Y. 532, 545.

The citation of *Matter of Grace* indicates that the court below considered as a matter in issue the precise question that Appellee claims was not previously submitted.¹ The *Grace* case, *supra*, was a proceeding to discipline an attorney because of his refusal to waive immunity against self-incrimination. The New York Court of Appeals, setting aside the attorney's suspension from practice held (pp. 434-435):

"The privilege against self-incrimination is a constitutional guaranty of a fundamental personal

¹ See *Bryant v. Zimmerman*, 278 U. S. 63, 69 (1928).

right. Long regarded as a safeguard of civil liberty it was firmly imbedded in the law of England and by the Fifth Amendment to the Federal Constitution became a basic principle of American constitutional law. It is a barrier interposed between the individual and the power of the government, a barrier interposed by the sovereign people of the state; and neither legislators nor judges are free to overleap it. *Matter of Doyle*, 257 N. Y. 244, 250. Applying this basic principle to our present problem we have no doubt that when the appellant, as a witness upon the inquiry at the Special Term, declined to sign a waiver of immunity and thus refused to relinquish in advance a privilege which the Constitution guarantees to him, he was within his legal right. As was said by Presiding Justice Lazansky in *Matter of Ellis*, 258 App. Div. 558, 572, expressing the minority view at the Appellate Division: "The constitutional privilege is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court."

The question of the conflict between the Fifth Amendment and Section 903 was indeed the basic issue before the state courts. There can be no question that Appellant was discharged for exercising his Fifth Amendment right (R. 53-54), and Appellant sought reinstatement on the ground that he could not be discharged for that reason. Even if the conflict between the Fifth Amendment and Section 903 had not been discussed by Appellant in the state court, it is properly before this Court, for it is clear that the question was considered by the court below (R. 7, 56, 61), and a decision of the issue was necessarily involved in the case. See *St. Louis, I. M. & S. Ry. Co. v. Stockard*, 33 U. S. 582, 598-599 (1917); *Water Power Co. v. Strickland*, 152 U. S. 475, 488 (1899). Since the highest court of the state assumed that the question was presented, it must be deemed properly presented, and it is unnecessary to look further to

determine when or in what manner it was raised. *Chambers v. Allstate Ind. Ass'n v. Alderson*, 324 U. S. 182, 185-186 (1945); *Ind. ex rel. Anderson v. Brand*, 303 U. S. 95, 98 (1938).

As noted before, Section 903 in limiting the Amendment Immunity against Self-Incrimination violates the Privileges and Immunities Clause. The Appellee claims that the argument with respect to the Privileges and Immunities Clause may not be made in this Court because that clause was not referred to in the court below. The Privileges and Immunities Clause was not specifically referred to in the state court. However, the argument with respect to the violation of that clause is so interrelated with the issue of the conflict between Section 903 and the Fifth Amendment that the timely raising of the one must be deemed to have preserved the other. Moreover, an identical argument is made by Appellant with respect to both the Privileges and Immunities Clause and the Due Process Clause of the Fourteenth Amendment.²

Appellee Board concedes that the arguments with respect to the Due Process Clause are properly before this Court. The Due Process argument having been timely made in state court, the same argument may be presented on appeal in connection with the Privileges and Immunities Clause, whether or not the latter clause was relied upon in the state court. *Branniff Airways v. Nebraska Board*, 319 U. S. 590, 598-599 (1954).

The *Branniff* case involved the validity of a state tax on aircraft. In that case the Appellant contended in state court and on appeal that the tax was invalid under the Commerce Clause of Article I of the Constitution.

² Appellee's brief, p. 9.

³ Namely that the statute violates both clauses in requiring surrender of the constitutional immunity as a condition of a

because levied on property that had no situs within the state. Although the argument relating to the tax situs of the property did not raise any issue under the Commerce Clause, it did raise a substantial federal question under the Due Process Clause of the Fourteenth Amendment. This Court found that the issue under the Due Process Clause was properly raised, preserved and presented, even though that Constitutional provision had not at any time been mentioned by Appellant. So in the instant case, Appellant must be deemed to have timely raised the arguments here presented in connection with the Privileges and Immunities Clause that were submitted below with respect to the Due Process Clause.

The Appellee cites *Dewey v. Des Moines*, 173 U. S. 193 (1899) as authority to support its position that the Privileges and Immunities Clause may not be invoked on this appeal. The reference to the *Dewey* case is somewhat misleading. In that case the city of Des Moines levied an assessment against certain property, and in addition recovered a personal judgment against the owner of the property. The property owner attacked the validity of the personal judgment in the state court on the ground that it contravened the Due Process Clause of the Fourteenth Amendment. The property owner contended in this Court and, for the first time, that the assessment against the property also contravened the Due Process Clause. This Court refused to consider the question relating to the property assessment on the ground that appellant was seeking a different ruling on constitutional grounds from that sought in the state courts. The rule of the *Dewey* case obviously has no application to the case on appeal.

It is moreover, difficult to understand why, if the federal question was not timely raised in the court below,

the Appellee failed to make that point pursuant to Revised Rules of the Supreme Court 16.1(b) on its motion to dismiss the appeal. The Appellee in its motion to dismiss did not contend that the issues were not properly raised (as it did in moving to dismiss the related appeal *Danisman v. Board of Education*, 348 U. S. 933) but only that the federal question was not substantial.

No inference of guilt, perjury, disloyalty or wrongdoing may be drawn from Appellant's assertion of right to refuse to incriminate himself.

The thesis of Appellee's argument, in the second portion of its brief, is: the exercise of the right against self-incrimination is dishonorable, therefore a statute disqualifying an employee who exercises the right is reasonable and proper. The Appellee contends that the invocation of the right "the least . . . tends to show an admission of guilt";¹ and the only other inference that may be drawn is that a person exercising the right is a perjurer.² The argument is unworthy of the Appellee and its counsel. The basic premise is completely erroneous, and the alleged authority cited to support it is either inapplicable or of no effect.³

If countenanced, the Appellee's premise would nullify and destroy the constitutional immunity. The right against self-incrimination would afford little protection indeed to those who asserted it were, by reason of the assertion, presumed guilty of the crime in question or of perjury.

¹ Appellee's brief, p. 20; emphasis ours.⁶ One wonders what Appellee considers *the most* that can be said with respect to invocation of the privilege.

² Appellee's brief, pp. 15, 19-20.

³ An argument similar to the Appellee's was offered in *Speck v. United States*, 193 Fed. 2d 1002 (9th Cir., 1952), and was summarily dismissed by the Court as "clear error." 193 Fed. 2d 1006, 1006. See also *United States v. Shughnessy*, 212 Fed. 2d 128, 131 (2nd Cir., 1954). The argument was also rejected by the court below (R. 54); *Danisman v. Board of Education*, 306 N. Y. 332, 5

At the last term, Chief Justice Warren, speaking for the Court in *Quinn v. United States*, 349 U. S. 155 at pages 161-162 (1955), said:

"The privilege against self-incrimination is a right that was hard earned by our forefathers. The reasons for its inclusion in the Constitution—and the necessities for its preservation—are to be found in the lessons of history. . . . The privilege, this Court has stated, was generally regarded then, as now, as a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions. . . . To apply the privilege narrowly or begrudgingly—to treat it as an historical relic, at most merely to be tolerated—is to ignore its development and purpose."

See Griswold, *the Fifth Amendment Today* 2-7; *Tyning v. State of New Jersey*, 211 U. S. 78, 91 (1908); *Boyd v. United States*, 116 U. S. 616, 631-632 (1886); all referred to in the footnotes to Mr. Justice Warren's opinion.

The Appellee would not merely limit the application of the privilege, it would entirely eliminate it, as a practical matter, from the Bill of Rights.

One who stands upon his Constitutional right against self-incrimination is no more to be condemned than one who stands upon the presumption of innocence, or one who demands trial by jury, or one who resists a search of his home without warrant. Those rights exist for the protection of the innocent and are not to be denied by the pretense that *only* the guilty would resort to them. The declaration of the right in the Constitution is a recognition of the justification, in fact, of the need for its existence. (See Cardozo, *The Paradoxes of Legal Science*, Columbia University Press, 1928 p. 48). So long as the immunity

against self-incrimination is guaranteed by the Constitution it must be recognized and given effect as a right basic to our political system. One who avails himself of this fundamental Constitutional right may not in law be deemed a transgressor.

Respectfully submitted,

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